

**STATE OF WISCONSIN  
Department of Commerce**

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*In the Matter of the PECFA Appeal of*

Tom Reinsch  
Condon Oil Co Inc  
PO Box 184  
Ripon WI 54971-0184

PECFA Claim #53926-9999-64  
Hearing #97-145

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**Final Decision**

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**P R E L I M I N A R Y   R E C I T A L S**

Pursuant to a petition for hearing filed October 6, 1997, under §101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce (Department), a hearing was commenced on November 17, 1998, at Madison, Wisconsin. A Proposed Decision was issued on May 20, 1999, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the Department's Decision dated September 24, 1997 establishing the final reimbursable costs to the Appellant from the Petroleum Environmental Cleanup Fund Act (PECFA) program was correct and reasonable.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

Tom Reinsch  
Condon Oil Co Inc  
PO Box 184  
Ripon WI 54971-0184

Wisconsin Department of Commerce  
PECFA Bureau  
201 West Washington Avenue  
PO Box 7838  
Madison WI 53707-7838

By: Kelly Cochrane  
Department of Commerce  
201 W. Washington Ave., Rm. 322A  
PO Box 7838  
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated September 4, 1999.

The matter now being ready for decision, I hereby issue the following

### FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated May 20, 1999 are hereby adopted for purposes of this Final Decision.

### CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated May 20, 1999 are hereby adopted for purposes of this Final Decision.

### DISCUSSION

The Discussion in the Proposed Decision dated May 20, 1999 is hereby adopted for purposes of this Final Decision,

### FINAL DECISION

The Proposed Decision dated May 20, 1999, is hereby adopted as the Final Decision of the Department.

### NOTICE TO PARTIES

#### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

#### Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for

judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: September 7, 1999

Terry W. Grosenheider  
Executive Assistant  
Department of Commerce  
P.O. Box 7970  
Madison WI 53707-7970

copies to:

Tom Reinsch  
Condon Oil Co Inc  
PO Box 184  
Ripon WI 54971-0184

Joyce Howe, Office Manager  
UI Madison Hearing Office  
1801 Aberg Ave Suite A  
Madison WI 53707-7975

Kelly Cochrane  
Department of Commerce  
201 W. Washington Ave., Rm. 322A  
PO Box 7838  
Madison WI 53707-7838

Date Mailed: September 9, 1999

Mailed By: Sandra Hagberg

**STATE OF WISCONSIN  
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS**

**IN THE MATTER OF: The claim for  
reimbursement under the PECPA**

MADISON HEARING OFFICE  
1801 Aberg Ave., suite A  
P.O. Box 7975

Program by

Madison, WI 53707-7975  
Telephone: (608) 242-4818  
Fax: (608) 242-4813

Tom Reinsch

**Hearing Number: 97-145**

**Re: PECFA Claim # 53926-9999-64**

**PROPOSED HEARING OFFICER DECISION**

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any Party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

**STATE HEARING OFFICER:**  
James R. Sturm

**DATED AND MAILED:**  
May 20, 1999

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MAILED TO:

Appellant Agent or Attorney

Department of Industry, Labor  
and Human Relations

Sigma Environmental Services  
David Scherzer  
220 East Ryan Road  
Oak Creek, WI 53154

Kelly Cochrane  
Assistant Legal Counsel  
P.O. Box 7970  
Madison, WI 53707-7970

**STATE OF WISCONSIN  
DEPARTMENT OF WORKFORCE DEVELOPMENT**

IN THE- MATTER OF:

Request for Reimbursement Pursuant  
to the Provisions of the PECFA Program

**Hearing Number:** 97-145  
**PECFA Claim Number:** 53926-9999-64

Tom Reinsch  
Condon Oil Co. Inc.

Wisconsin Department of Commerce,

Appellant

Respondent.

vs

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**PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW**

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On September 24, 1997, the Department of Commerce (department) issued a decision denying Condon Oil Co. Inc. (appellant) reimbursement of \$2880, a portion of its total claim of \$29,968.20. The appellant filed a timely appeal and, pursuant to that appeal, a hearing was held on November 17, 1998, before Law Judge James R. Sturm, acting as a state hearing officer.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

**PROPOSED FINDINGS OF FACT**

1. At all times material, Condon Oil Co. Inc., was the legal owner of the premises known as the Dalton Bulk Facility located at Dalton, Wisconsin.
2. As part of the remediation effort at the subject property initiated in 1994, the appellant engaged the services an environmental consultant and water and oil testing services.
3. The appellant obtained bids from testing services and Robert E. Lee & Associates Inc. submitted the lowest bid and the appellant entered into a contractual relationship with that concern.
4. November 21 and 22, 1994, the appellant by its agents, submitted soil samples to En Chem Inc., a testing laboratory. On December 9, 1994, the appellant submitted a water sample to En Chem Inc. The appellant was billed \$2024 for the soil testing and \$856 for the water testing and submitted those costs totaling \$2880 to the PECFA program for reimbursement.

**RELEVANT STATUTES AND RULES**

Section ILHR 47.30(t)(b) of the Wisconsin Administrative Code provides as follows:

- (1) **ELIGIBLE COSTS.** Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department. Costs related to the following categories may be reimbursed under the scope of this chapter:

- (b) Costs associated with emergency action, site investigation and remedial plan development, remediation, long-term monitoring or operation and maintenance:

Section ILHR 47.33(l)(b) I and 4 of the Wisconsin Administrative Code provides as follows:

(b) *Commodity purchases.* 1. All commodity services which include, but are not limited to, soil borings, monitoring-well construction, laboratory analysis, excavation and trucking shall be obtained through a competitive bid process. A minimum of 3 bids are required to be obtained and the lowest cost service provider shall be selected...

4. An owner or operator may appeal the department to obtain approval to select other than the lowest cost commodity service provider. The department may approve an appeal if it determines that the use of another service provider will further the goals of the program.

### **THE APPELLANT'S POSITION**

The appellant contends that it is eligible for reimbursement under the PECFA program for the costs incurred by its payments for the testing services of En Chem in the amount of \$2880 because the contracted provider was not available to conduct tests of soil samples which were made during the holiday week of Thanksgiving and that it made a good faith effort to provide timely and accurate testing of those soil samples and subsequent water testing by obtaining the testing services of a laboratory that had submitted a higher bid but was open for business during the week the samples were taken.

The appellant points out that the bids were only slight dissimilar and that the overall cost savings, at least for this one time use, was minimal and should not be denied.

### **THE RESPONDENT'S POSITION**

The department/respondent contends that it rightfully denied the payment of costs submitted for services for a non-approved laboratory because the administrative rules prohibit reimbursement unless the costs were either pre-approved or approved upon appeal, neither of which occurred here.

### **DISCUSSION**

The appellant's contention cannot be sustained. The rules and statutes clearly and unequivocally describe the reimbursement eligibility and process which the appellant failed to follow regardless of its good faith decision to contract with En Chem as its testing laboratory on one occasion because it was expedient and cost effective when its primary contractor was shut down for a holiday.

While the appellant's argument is reasonable, the rules which govern the reimbursement process do not contain any "good cause" provision for over-riding the process. While the statutes and rules give the department considerable discretion to make judgment calls on certain claims with respect to the design and effectiveness of remedial systems, it does not provide the same discretion with respect to the selection and eligibility of vendors and service providers. The appellant assumed the risk that the costs of its alternative choice would not be approved and, not surprisingly, reimbursement was not, and could not, be approved.

### **PROPOSED CONCLUSIONS OF LAW**

1. Condon Oil Company, Inc is a property owner within the meaning of section 101.143 of the Wisconsin Statutes.
2. The Department's action denying reimbursement in the amount of \$2880 for costs incurred during the appellant's remediation project on November 21, 22 and December 9, 1994 was proper under sections 101.143(3)(d) and 144.76 of the Wisconsin Statutes and ILHR 47.33.

### **PROPOSED DECISION**

The State Hearing Officer therefore finds that the decision of the department of commerce dated September 24, 1997 establishing the final reimbursable costs to the applicant Condon Oil Company, Inc. was reasonable and is affirmed.

Dated this 20<sup>th</sup> day of April, 1999

James R. Sturm  
Administrative Law Judge  
Madison Hearing Office  
1801 Aberg Avenue, Suite A  
P.O. Box 7985  
Madison, WI 53797-7985

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